The meeting was called to order at 9 p.m.

CONSIDERATION OF THE QUESTION CONCERNING THE FINALIZATION AND ADOPTION OF A CONVENTION ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTIONS 51/207 OF 17 DECEMBER 1996 AND 52/160 OF 15 DECEMBER 1997 (*continued*) (A/CONF.183/2/Add.1 and Corr.1; A/CONF.183/C.1/L.59)

Part 2 of the draft Statute (continued)

Proposal prepared by the Bureau (continued)

1. **Mr. FIFE** (Norway) said that automatic jurisdiction and a uniform jurisdictional regime for the three core crimes were essential for the credibility of the Court. His delegation was still not persuaded that the crime of aggression or any of the treaty crimes could be inserted at the present stage, but thought they could be addressed in some other manner at a later stage.

2. On war crimes (article 5 *quater*), his delegation favoured the threshold in option 2. It could support the listing of weapons in section B, paragraph (o), but was not yet persuaded that the drafting of paragraph (o), subparagraph (vi), was suitable. Regarding armed conflicts not of an international character, Norway still wished to see the inclusion of both section C and section D. In restricting the application of section D to conflicts between armed forces and dissident armed forces, the new *chapeau* unduly limited the scope of well-established norms of international law.

3. Norway could basically support the inclusion of article xx on elements of crimes, but was not persuaded that the wording proposed was useful. It should be made absolutely clear that the elements to be considered would be guidelines of a non-binding nature. In paragraph 4, the word "shall" needed to be replaced by the word "should", so as to avoid the possibility of an interpretation that would allow a single State to veto the initiation of an investigation.

4. With regard to article 6 on exercise of jurisdiction, his delegation had difficulty in accepting that a distinction should be drawn between genocide and other crimes against humanity. On preconditions to the exercise of jurisdiction, Norway favoured option 1 for paragraph 2. It agreed that option 3 would actually be an incentive for States not to ratify the Statute, as it would effectively give non-States parties the right to veto the possibility of prosecuting their nationals. Norway thus favoured option 1 for article 7 *bis* on acceptance of jurisdiction and could support the proposal in article 7 *ter*.

5. On the role of the Security Council, his delegation definitely favoured option 1 for article 10 and did not see how a waiting period of twelve months could be at variance with Article 103 of the Charter. Norway had no objection to article 11. As for article 12, it strongly favoured option 1, conferring *proprio motu* powers on the Prosecutor. The existing safeguards were basically satisfactory, although article 16 also contained safeguard provisions that might be worth exploring.

6. **Ms. SHAHEN** (Libyan Arab Jamahiriya) said the proposal before the Committee took into account only one point of view and did not represent a balanced approach. The crime of aggression must be included in the Statute. Economic embargoes should be included in article 5 *ter* as a crime against humanity. The exclusion of nuclear weapons from section B, paragraph (o), of article 5 *quater* was a grave omission. Her delegation opposed the inclusion of sections C and D on armed conflicts not of an international character, although, if section C had been

amended to indicate that its provisions were without prejudice to the sovereignty of States, her country might have been able to accept it.

7. Concerning preconditions to the exercise of jurisdiction, she said that jurisdiction must be uniform and preferably of the opt-in type, which was not reflected in the Bureau's proposal. The power vested in the Prosecutor should be restricted. He or she hould be able to commence an investigation on the basis of information obtained from a State, but not on the basis of information from non-governmental organizations, victims or their representatives.

8. With regard to article 10, her delegation could not agree to any role for the Security Council. The Court would be paralysed if the Security Council could impede its investigations because of the veto power of individual States. Her delegation therefore favoured the deletion of article 10.

9. **Mr. R. P. DOMINGOS** (Angola) said that, although the Bureau proposal was commendable, his delegation regretted that it did not take into account the definition of aggression proposed in document A/CONF.183/C.1/L.56. Angola also regretted that, in connection with weapons to be prohibited, no reference was made to nuclear weapons and anti-personnel mines. It advocated automatic jurisdiction for the gravest crimes and endorsed the inclusion of paragraph (c) in article 6.

10. On the role of the Security Council, his delegation could support option 1 in article 10 but believed that limits must be set: the Council must not be permitted to suspend the jurisdiction of the Court indefinitely. Angola also supported a strong and independent prosecutor with ex officio powers and therefore favoured option 1 for article 12. That option already provided sufficient safeguards.

11. **Mr. OKOULATSONGO** (Congo) said his delegation was surprised to note that, disregarding the views of the majority, the Bureau had not included the crime of aggression as a core crime within the jurisdiction of the Court, instead setting a deadline for agreement on a definition. Failure to meet that deadline would mean, however, not—as the Bureau apparently hoped—that the interest in addressing that crime would have to be reflected in some other way, but that the crime of aggression would have to be included in the Statute and the question of its definition deferred to some future date.

12. Irrespective of whether or not a conflict was international, it was children, women and the elderly who suffered the most. Efforts must continue to find an acceptable formulation for the provisions protecting those vulnerable sectors of the population, particularly women victims of sexual violence during armed conflicts.

13. The phrase "'Torture' means the intentional infliction of severe pain or suffering ... upon a person in the custody or under the control of the accused", in article 5 *ter*, paragraph 2 (c), was badly formulated, as, at the time when the torture was carried out, the person who inflicted it had not yet been an accused person. The phrase should therefore read: "'Torture' means the intentional infliction by a person of severe pain or suffering ... upon another person under his or her custody or control". The phrase "pursuant to or in furtherance of a State or organizational policy to commit such attack", in article 5 *ter*, paragraph 2 (a), constituted an unacceptable threshold that in no way reflected contemporary realities or international law. Most delegations had supported option 3 in discussion paper A/CONF.183/C.1/L.53. That option was not included in the Bureau proposal, and should be reinstated. Option 2 could be accepted only for lack of anything better.

14. Both options in the *chapeau* of article 5 *quater*, on war crimes, should be deleted, as the words "as a part of a plan or policy or as part of a large-scale commission of such crimes" might result in impunity for those who

committed war crimes. The *chapeau* to that article should consist only of the words "For the purpose of the present Statute, war crimes means:".

15. With regard to preconditions to the exercise of jurisdiction, his delegation was surprised to see that the proposal by Germany in that regard had not been retained. Nevertheless, in a spirit of cooperation, his delegation could accept option 1 for article 7 *bis*, which proposed automatic jurisdiction over the three core crimes.

16. On the role of the Security Council, the period of time during which the Court must suspend an investigation at the request of the Council must not exceed six months and must not be renewable. Protection of witnesses and of evidence must be ensured. The Prosecutor must be able to initiate investigations *proprio motu*, but article 12 established an unacceptable regime. The Pre-Trial Chamber should be entitled to act only after the Prosecutor had done so, and the latter must have very broad powers in order to carry out an effective investigation. His delegation accordingly rejected both option 1 and option 2 for article 12.

17. **Mr. MAQUIEIRA** (Chile) said that acceptance of jurisdiction must be automatic. The options for preconditions to the exercise of jurisdiction set out in the Bureau proposal could form the basis for a solution. There was no major difference between the two options in article 10 on the role of the Security Council. Perhaps a compromise could be found that would make it possible, with the agreement of the Pre-Trial Chamber, to take the necessary measures to safeguard evidence.

18. Additional safeguards for the Prosector could be acceptable provided they were not merely a device for reducing or eliminating the Prosecutor's *proprio motu* capacity by roundabout means. Finally, the provisions on elements of crimes should serve as guidelines without binding effect.

19. **Mr. Sayyid Said Hilal AL-BUSAIDY** (Oman) said his delegation shared the views expressed by the representative of the Islamic Republic of Iran on behalf of the Non-Aligned Movement concerning article 5. Like many other countries of that Movement, Oman was disappointed to see that the crime of aggression had not been included among the core crimes within the jurisdiction of the Court, and supported the inclusion of a clear definition of that crime along the lines proposed by the delegations of the Syrian Arab Republic and Bahrain.

20. Although Oman believed that there should be no threshold for war crimes, it could, in a spirit of compromise, support the threshold in option 2 for the *chapeau* of article 5 *quater*. Nuclear weapons should be included in the list. Internal conflicts should not fall within the jurisdiction of the Court except in the event of total collapse of the judicial system. With regard to preconditions, following the withdrawal of option 3 his delegation had no choice but to accept option 2.

21. In article 7 *bis*, Oman supported option 2, which provided for automatic jurisdiction for genocide and opt-in jurisdiction for crimes against humanity and war crimes. Article 7 *ter* should be retained. On article 10, the Security Council should in no circumstances be allowed to hinder the work of the Court. The duration of the period during which the Court could be requested to suspend its investigation or prosecution must be specified, and that period must be brief and non-renewable.

22. The Prosecutor should have a prominent role, but should not be able to initiate investigations *proprio motu*. However, if he or she were accorded such powers, Oman would support option 2 for article 12.

23. **Mr. DIAZ LA TORRE** (Peru) said there appeared to be a consensus that genocide, crimes against humanity and war crimes should constitute the core crimes; it was to be hoped that consensus could also be reached on

acceptance of automatic jurisdiction over all three core crimes. Options 1 and 2 for article 10 could be combined so that the Court would suspend its activity at the request of the Security Council for a period of twelve months, renewable once, if the accused person was not under detention. If the accused was detained, the suspension should be for six months only, renewable once only.

24. On the role of the Prosecutor, Peru was satisfied with option 1 for article 12, particularly its paragraph 3. It saw no need to include a provision for additional safeguards before the Prosecutor could act. Elements of crimes should be defined before the Statute entered into force. Peru supported article Y as currently drafted. It preferred option 2, covering sections A and B, in article 5 *quater*. The crime of sexual violence should of course be included in both articles 5 *ter* and 5 *quater*. Lastly, Peru also supported the Spanish proposal that the second sentence of article 7 *ter* should be strengthened so as to require the accepting State to cooperate with the Court in accordance with all the provisions of the Statute—not merely with Part 9 thereof.

25. **Mr. AGIUS** (Malta) said that his country was strongly opposed to any opt-in or opt-out possibility with regard to the acceptance of jurisdiction and firmly in favour of automatic jurisdiction over all three core crimes. With regard to preconditions to the exercise of jurisdiction, Malta favoured uniformity for all the core crimes, along the lines of the proposal by the Republic of Korea. It reiterated its support for a prosecutor with *proprio motu* powers. For article 12 it preferred option 1, which contained adequate safeguards. A provision for additional safeguards would be acceptable only as a compromise.

26. Malta preferred option 1 for article 10 on the role of the Security Council: option 2 carried the inherent risk that Security Council deliberations might be protracted indefinitely. With regard to article xx, the end result of the inclusion of that provision would be to render the Statute ineffective for as long as it took to achieve consensus on a formulation. In any event, Malta was against the retention of paragraph 4.

27. The crime of aggression should be included in the Statute, and Malta held out hope for a last-minute consensus on an acceptable definition. Failing that, it would fully support the recommendation made by the representative of Germany in that regard. As for treaty crimes, Malta agreed with the Bureau's recommendation that they should be deferred for future consideration.

28. **Ms. TOMIČ** (Slovenia) said that, on the acceptance of jurisdiction and its exercise, her delegation favoured a uniform approach to all three core crimes, namely, automatic jurisdiction upon ratification of the Statute and the application of the formula proposed by the Republic of Korea for the preconditions. Accordingly, Slovenia favoured article 7, paragraph 1, and option 1 for paragraph 2. It would prefer subparagraph 2 (b) to be reformulated in order to refer to the State on whose territory the accused or suspect was present, rather than to the State that had custody, a wording that could be interpreted too narrowly. Her delegation strongly supported option 1 for article 7 *bis*.

29. As to the *chapeau* of article 5 *quater*, Slovenia favoured option 2 for the general threshold and supported the inclusion of paragraph (a *ter*) in section B. It had already proposed inclusion of a reference to civilians or civilian objects within United Nations safe areas, but despite considerable support, that wording had not been reflected in the Bureau's proposal. In view of the late stage of negotiations, her delegation would not insist on its proposal, but wished to place on record its understanding of Section B, paragraph (a), concerning attacks against civilian populations, as also providing protection to civilians in safe areas.

30. Slovenia had noted with concern the heightened threshold in section D, the shortened list of crimes, and especially the deletion of the weapons provision. It endorsed the amendment proposed by the delegation of

Sierra Leone for the *chapeau* of section D. It firmly supported inclusion of crimes of sexual violence in their various manifestations, including enforced pregnancies, both under war crimes and under crimes against humanity.

31. On article xx, Slovenia favoured the deletion of paragraph 4, as adoption of elements of crimes should not delay the Statute's entry into force and the future Court's functioning. Elements of crimes should serve as guidelines of a non-binding nature. Slovenia could support option 1 for article 10 on the role of the Security Council, with a precisely defined time-frame of twelve months, and would favour the inclusion of additional language concerning the preservation of evidence. Finally, her delegation reiterated its support for conferring *proprio motu* powers on the Prosecutor and its belief that the safeguards already set out in article 12 were sufficient.

32. **Mr. PATEL** (Zimbabwe) said his delegation endorsed the view that aggression was an international crime *par excellence* and that it should be included in article 5. Regarding article 5 *quater*, option 2 was clearly preferable, as it allowed for the widest possible jurisdiction over war crimes. The concern that inclusion of minor breaches might undermine the Court's effectiveness was covered by the reference in article 15, paragraph 1 (d), to cases not of sufficient gravity to justify further action by the Court.

33. On section B, paragraph (o), and the listing of weapons, Zimbabwe would prefer to include nuclear weapons and landmines, because they were inherently indiscriminate. If that was not possible, the entire list could be deleted and only a general reference to weapons which were disproportionate or indiscriminate in their effects included. Failing all else, paragraph (o) could be accepted in the light of the provisions of its subparagraph (vi). The lower threshold for sections C and D was to be preferred, and consistency between the two *chapeau* should be ensured.

34. With regard to article 7, paragraph 2, his delegation favoured option 1 in paragraph 2, as being consistent with the principle of universal jurisdiction. For article 7 *bis*, his delegation likewise supported option 1, providing for automatic jurisdiction over all three core crimes. Article 10 on the role of the Security Council would be appropriate only if the crime of aggression were included in the Statute. Otherwise, the article should be deleted.

35. Article xx was unclear in object and content, and should be deleted. If it was retained, its paragraph 4 should certainly not be allowed to stand.

36. **Mr. MORSHED** (Bangladesh) said his delegation wished to join those of Botswana and Jordan in expressing the strong hope that adequate language would be found to cover crimes of sexual violence in paragraph (p *bis*) of article 5 *quater*, section B. Bangladesh preferred option 2 on the powers of the Prosecutor: the Pre-Trial Chamber should consist of five judges with mandatory review powers, and a unanimous, affirmative vote of all five members should be necessary before the Prosecutor could act.

37. **Mr. RHENAN SEGURA CARMONA** (Costa Rica) said there should be automatic jurisdiction over all three core crimes. Costa Rica supported option 2 for the *chapeau* to article 5 *quater* and was satisfied with the wording of paragraph (b *bis*) in section D. It hoped that a definition would soon be found for crimes of sexual violence. Nuclear weapons should be included in paragraph (o) of section B. Armed conflicts not of an international character should be covered by the Statute, and section D of article 5 *quater* should be strengthened so as to cover conflicts between different armed groups or involving armed groups that did not control territory. Paragraph 4 of article xx, on elements of crimes, posed serious problems. His delegation supported article Y and the inclusion of paragraph (c) in article 6. Paragraph 1 of article 7 and option 1 for paragraph 2 should be merged so as to produce a single text. His delegation supported option 1 for article 10 on the role of the Security Council and option 1 for article 12 on the Prosecutor.

38. **Mr. GONZALEZ DAZA** (Bolivia) said his delegation regretted the fact that the crimes of aggression, drug trafficking and terrorism, which were new threats to international and internal peace and security, had not been included in the Statute. The suggestion that they should be dealt with later at a special conference left his delegation fearful that extension of the Court's jurisdiction to cover such crimes might be postponed indefinitely. On article 6, Bolivia endorsed Mexico's view that not only the Security Council but also the General Assembly should be able to refer situations to the Prosecutor. On article 7 *bis*, Bolivia supported automatic jurisdiction over all core crimes. Lastly, it favoured deletion of article 10, as options 1 and 2 would limit the autonomy of the Court and make it dependent upon the political decisions of the Security Council.

39. **Mr. MINOVES TRIQUELL** (Andorra) said that his delegation would have been able to support inclusion of the crime of aggression, but that since the definition of that crime posed problems, it might be best to defer consideration of the matter and to try to make progress on other subjects. Andorra supported option 2 for the *chapeau* of article 5 *quater* on war crimes and favoured the inclusion of sections C and D. On the exercise of jurisdiction, it endorsed article 6 and option 1 for article 12. The role of the Security Council was properly covered in option 1 for article 10, and the Belgian proposal on the need for preservation of evidence was of interest. While, in a spirit of compromise, his delegation could agree to the inclusion of article 16, it believed that article should be simplified.

40. **Mr. ZAPPALA** (Bosnia and Herzegovina) said his delegation could support only option 1 for article 7 *bis*, namely, automatic jurisdiction over all three core crimes. A uniform approach to the core crimes should be retained in article 7, and his delegation therefore supported option 1 for paragraph 2. It preferred option 1 for article 10 on the role of the Security Council but believed that options 1 and 2 could be combined to form a composite text, including a provision to ensure the protection of witnesses and the preservation of evidence during any suspension of the Court's action by the Security Council.

41. Option 1 for article 12, on the *proprio motu* powers of the Prosecutor, was the only possible solution, and already contained sufficient safeguards. On article xx, his delegation believed that elements of crime should be guidelines only and should not prevent the entry into force of the Statute. Consequently, the word "shall", in paragraph 4 of that article, needed to be amended to read "should".

42. His delegation was concerned about raising the threshold for war crimes under section D of article 5 *quater*, but thought that if a different threshold had to be established, the wording proposed by the delegation of Sierra Leone would be acceptable. Regarding the list of crimes in article 5 *quater*, he shared the regret expressed by the representative of Slovenia over the exclusion of the reference to civilians and civilian objects within United Nations safe areas. On article 7, he supported the Slovenian proposal that the phrase "the State that has custody of the accused or suspect" should be amended so as to refer to the State in whose territory the accused was present.

43. **Mr. BELINGA EBOUTOU** (Cameroon) said that article 18, paragraph 3 (a) and (b), raised the problem of complementarity. The questions as to who should decide that proceedings had not been conducted independently, and on the basis of what criteria, also arose. Those two subparagraphs should be deleted, along with the words "unless the proceedings in the other court" that immediately preceded them.

44. For article 12, further improvements needed to be made to dispel any remaining ambiguity. Paragraph 1 of option 1 might read "The Prosecutor may initiate a preliminary investigation in the following circumstances", with those circumstances enumerated thereafter. On article 10, his delegation favoured the Security Council's involvement. The idea that the Court could not restrict or violate the prerogatives of the Security Council had been

reflected in a working paper submitted by his delegation (A/CONF.183/C.1/L.39). Cameroon therefore favoured option 1, which preserved the prerogatives of the Security Council as well as the autonomy of the Court. For article 7 *bis* on acceptance of jurisdiction, his delegation was inclined to favour option 2.

45. On article 5, exclusion of the crime of aggression would be a grave omission. His delegation wished to propose a formulation to serve as a basis for the search for consensus to read: "The jurisdiction of the Court shall cover the most serious crimes of concern to the international community as a whole. The Court shall have jurisdiction in accordance with this Statute with respect to the following crimes: the crime of genocide, crimes against humanity, war crimes and the crime of aggression, whose elements will be adopted by the Assembly of States Parties." Such a formulation would refocus participants' attention on the expectations of the international community.

46. **Mr. TOMKA** (Slovakia) said his delegation, too, would have welcomed inclusion of the crime of aggression among the crimes within the jurisdiction of the Court under article 5. However, that matter should now be left for the review conference. Concerning article 5 *quater* on war crimes, Slovakia had strongly favoured the third option set out in the earlier discussion paper A/CONF.183/C.1/L.53. Since there seemed to be very little support for option 1, his delegation believed it should be deleted.

47. Concerning article xx, elements of crimes should not be binding on the Court but should simply serve as guidelines. The International Criminal Tribunals for the Former Yugoslavia and for Rwanda had been able to function effectively without any provisions relating to the elements of crime. Similarly, the Court would be able to function perfectly well on the basis of the Statute. Paragraph 4 of article xx should be deleted.

48. The order of articles 7 and 7 *bis* should be reversed. His delegation favoured automatic jurisdiction, and considered that an opt-in formula for crimes against humanity and war crimes would be the worst possible solution, because it would discourage States from accepting obligations. There was no reason to make a distinction between preconditions to the exercise of jurisdiction over genocide and over crimes against humanity and war crimes: the paragraph on preconditions for genocide should be applicable to the two other categories of crimes. Regarding article 7 *ter*, the introductory phrase "If the acceptance of a State that is not a Party to this Statute is required under article 7" should be replaced by the words "If the acceptance of a State that is not a Party to the Statute is a precondition to the exercise of its jurisdiction under article 7", as acceptance by a non-State party could not be required under article 7.

49. Slovakia had a slight preference for option 1 on the role of the Security Council but could also accept option 2, provided that a provision concerning preservation of evidence, along the lines proposed by Belgium in document A/CONF.183/C.1/L.7, was included. Article 10 could form part of a package deal on jurisdictional issues, as could article 12, for which his delegation preferred option 1.

50. **Ms. DOBRAJA** (Latvia) expressed support for the statement made by the representative of Austria on behalf of the European Union. With regard to article 5, she said that, like the overwhelming majority of delegations, Latvia was disappointed at the fact that the crime of aggression was not to be covered by the Statute. A resolution or clause in the Final Act should be drafted to reflect the views of the majority in that regard. Concerning jurisdiction, her delegation favoured option 1 in articles 7 and 7 *bis*. On article xx, Latvia supported the views expressed by the representative of Canada. On the role of the Security Council, it supported option 1 for article 10. As for the role of the Prosecutor, Latvia favoured option 1 for article 12.

51. **Ms. DOSWALD-BECK** (Observer for the International Committee of the Red Cross) said that acceptance of jurisdiction was a fundamental issue. Would-be war criminals must realize that, if they were not tried at the

national level, the likelihood was that they would be tried at the international level. The Court must thus have automatic jurisdiction over war crimes and crimes against humanity, not just over genocide. Her organization was particularly concerned at the suggestion that there should be no universal jurisdiction for war crimes, given that all the States present were parties to the Geneva Conventions of 1949, which provided for compulsory universal jurisdiction over grave breaches. Following the Second World War, war criminals had been tried on the basis of such universal jurisdiction. Suggestions that universal jurisdiction was a utopian dream were thus the opposite of the truth. Under international law, every State had the right, and most had the duty, to prosecute or extradite suspected war criminals. Any form of additional consent, such as an opt-in precondition for the exercise of the Court's jurisdiction, might give the impression that States could lawfully protect war criminals from prosecution. That would be a retrograde step for international law and would severely limit the Court's effectiveness.

52. With regard to armed conflicts not of an international character, she pointed out that under the new threshold added to section D, many conflicts, and indeed most internal armed conflicts, would not be covered, and that many atrocities would thus not be triable under the Statute. Furthermore, many of the acts listed in section D were recognized as crimes by customary law. It was therefore most important that that section should not be omitted.

53. **THE CHAIRMAN** said that the Committee of the Whole had thus concluded its consideration of the Bureau proposal contained in document A/CONF.183/C.1/L.59.

The meeting rose at 10.50 p.m.